

Date: July 31, 1997

Case No.: 95-INA-00542

In the Matter of:

LOUIS BROWN,
Employer

On Behalf Of:

ANITA POLOWCZYK,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 24, 1994, Louis Brown ("Employer") filed an application for labor certification to enable Anita Polowczyk ("Alien") to fill the position of Family Dinner Service Specialist (AF 4-5). The job duties for the position are:

Plans menus and cooks meals according to recipes. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. Accounts for the expenses incurred in purchasing foodstuff. The meals have to be prepared with low fat, low cholesterol and low sodium for a person with heart condition.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on March 28, 1995 (AF 24-26), proposing to deny certification on the grounds that it does not appear feasible that the stated duties constitute full-time employment in the context of the Employer's household. The CO advised the Employer to establish that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (now recodified as § 656.3) by providing evidence which clearly establishes that the position, as performed in the Employer's household, constitutes full-time employment.

Accordingly, the Employer was notified that it had until May 2, 1995, to rebut the findings or to cure the defects noted.

In his rebuttal, dated April 25, 1995, and submitted under cover letter dated April 27, 1995 (AF 27-33), the Employer contended that he and his wife are "forced to seek professional help" as they are not able to provide nutritious meals anymore. The Employer also stated that because of his "serious by-pass surgery," he must adhere to a sodium and cholesterol-free diet. He attached a letter from Dr. Daniel Waxman, Cardiologist, to his rebuttal.

Next, the Employer stated that his daughter has been preparing meals for he and his wife on a full-time, unpaid basis but she intends to resume her professional career and will no longer be able to do this. He included with his rebuttal a letter from his daughter to this effect. The

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Employer further stated that the cook will prepare all the meals for his daughter and her family of four, also. Next, the Employer contended that the cook will not be required to perform any duties other than cooking and cooking-related duties, and that there will be no overtime hours.

The Employer included in his rebuttal a proposed work schedule accounting for eight hours per day, 40 hours per week. The Employer stated that the cook will be required to prepare a total of 30 breakfasts, 20 lunches, 30 afternoon meals, 40 dinners, and about 54 snacks weekly for his family members. The Employer included a list of the school schedules of his two grandchildren, and stated that his wife supervises them while they are home.

The Employer concluded that cleaning and household maintenance duties are now and will be performed by his daughter on the weekends. He also stated that the requirement for a full-time cook arises from business necessity, it constitutes full-time employment in the context of his household, and he is financially “well capable” to pay the prevailing wage.

The CO issued the Final Determination on May 5, 1995 (AF 34-35), denying certification because it now appears, from the Employer’s rebuttal, that the Employer does not have enough work in his own home to constitute hiring a full-time, live-out cook, and that the Alien will be performing such duties for two different households. Accordingly, the CO found that the Employer remains in violation of 20 C.F.R. § 656.3.

The Employer requested review of the denial of labor certification by letter dated May 15, 1995, submitted under cover letter dated May 22, 1995 (AF 36-43). On August 4, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”). On August 29, 1995, Counsel for the Employer submitted a Brief.

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that “employment” means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer’s own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 24-25). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared;

(2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In its rebuttal, the Employer asserted that he and his wife are both retired, but cannot perform the cooking duties due to their "increasing age" (AF 32). The Employer further stated that he is required to adhere to a sodium and cholesterol-free diet. He provided a doctor's note to support this contention. The Employer stated that his daughter previously performed the cooking duties, but cannot continue doing so as she intends to resume her professional career. The Employer provided a typical menu, along with preparation time for each meal. In summary, the Alien will be required to cook 30 breakfasts, 54 snacks, 20 lunches, 30 afternoon meals, and 40 dinners weekly. The meals will be prepared for the Employer and his wife, their daughter and her husband and their two children. The Employer explained that the children are both in school from 9:00 a.m. until 3:00 p.m. Furthermore, the Employer stated that his daughter and her husband work from 9:00 a.m. until 5:00 p.m. daily. Finally, the Employer asserted that his daughter performs the cooking and maintenance duties on the weekends.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. However, we are unable to make that determination at this time, as the CO has raised a new issue for the first time in the Final Determination. The Employer's rebuttal indicated that the Alien would be cooking for the Employer's daughter and her family as well. The CO, in the FD, then found that "[t]herefore, it appears that employer does not have enough work in his own home to constitute hiring a full time live-out cook and that alien will be performing such duties at two different households." We find that the CO should have issued a second NOF, to give the Employer and opportunity to respond to this new issue.

Accordingly, this matter must be remanded for the Certifying Officer to issue a new NOF and permit the Employer an opportunity to rebut.

ORDER

The Certifying Officer's denial of labor certification is **VACATED** and this matter is hereby **REMANDED** for further action consistent with this decision.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

Dolores DeHaan, Certifying Officer
U.S. Department of Labor/ETA
201 Varick Street, Room 755
New York, NY 10014